IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL ACTION NO. ABU 0050 OF 2004
(High Court Judicial Review HBJ 3 OF 2004S)

BETWEEN:

ALI HASSAN
(f/n Abdul Razak)

Appellant

AND:

TRANSPORT WORKERS UNION

First Respondent

AND: PERMANENT SECRETARY FOR LABOUR AND INDUSTRIAL RELATIONS AND PRODUCTIVITY

Second Respondent

AND: THE ATTORNEY-GENERAL

Third Respondent

Coram: Eichelbaum, JA
Gallen, JA
Scott, JA

Date of Hearing: 22 July 2005

Counsel: Mr. J. Cameron with Mr. S. Chandra for the Appellant
Mr. R.P. Singh for the First Respondent
Mr. J.J. Udit with Mr. S. Sharma for the Second and Third Respondent

Date of Judgment: 29 July 2005

JUDGMENT OF THE COURT

[1] The Appellant operates a taxi business known as Sanyo Cabs (Sanyo) from a base on the corner of Waimanu Road and Extension Street opposite the CWM Hospital. The business, which was founded in 1966, is by now a substantial operation, involving no less than 43 taxis. In the addition to the drivers there are seven office clerks and controllers and six mechanics. It is the drivers however with whom this appeal is principally concerned.

[2] The first Respondent (the Union), as its name suggests, is a Trade Union which represents the interests of workers in the transport industry.

[3] On 24 December 2002 the Union's General Secretary, Mr. Attar Singh, wrote to the Appellant. In his letter, which was hand delivered to Sanyo, Mr. Singh explained that in recent weeks a majority of Sanyo's employees had joined the Union and that therefore the Union was now seeking Sanyo's voluntary recognition.

[4] On the same day the Appellant replied. The body of his letter to the Union is short and is set out in full:

> "Re: Union Voluntary Recognition
>
> I have received your letter dated 24 December 2002 and I am sorry to advise you that I cannot accord your Union voluntary recognition.
>
> For me to do so I invite your job evidence that you command more than fifty percent of my total workforce."

[5] After receiving the Appellant's reply, the Union wrote to the second Respondent (the Permanent Secretary). Mr. Singh told the Permanent Secretary that the Union had sought voluntary recognition by Sanyo but rather than grant the

recognition Sanyo had dismissed five of the Union's members and required a number of others to resign their union membership. According to Mr. Singh, on 28 December the Appellant also informed the Union that he did not wish to recognise it and that he preferred to have a non unionised workplace. In these circumstances the Union was now asking the Permanent Secretary to issue a Compulsory Recognition Order in their favour.

[6] The Union's request to the Permanent Secretary was made in accordance with the provisions of Section 3 (4) of the Trade Unions (Recognition) Act 53/1998 (the Act). This section provides that where a union's request for voluntary recognition has been refused by the employer the union may apply to the Permanent Secretary for compulsory recognition to be accorded under the provisions of Section 8.

[7] By virtue of Section 3(1) (a) of the Act a union is only entitled to request voluntary recognition where 50% of an employers employees are eligible for membership of the union and are voting members. A Compulsory Recognition Order may not be made under section 8 unless a union's request, properly complying with the requirements of Section 3 (1) (a), has been refused by the employer. Only if both of these statutory prerequisites have been satisfied may the Permanent Secretary then proceed to consider whether a Compulsory Recognition Order should issue. Both in the High Court and before us counsel for the Appellant suggested that neither of these two requirements had been satisfied.

[8] It was first argued that the reply to the Union's request set out above was not in fact a refusal to recognise the Union. In answer, Mr. Udit invited us to look at the surrounding circumstances and not only at the letter. Among those circumstances was the undenied allegation that the Appellant had advised the Union on about 28 December that he did not want a unionised workplace. Even more conclusive however was the Appellant's own evidence, contained in his affidavit filed on 7 October 2003. In paragraph 20 he stated:

> "the question of Voluntary Recognition by me of the Union did not arise as all of the drivers i.e. 26 of them were under an independent contract ....."

In paragraph 16 of the same affidavit he wrote:

> "the contract system of driving is prevalent all over Fiji and it is a matter of tradition and practice that drivers do drive under contracts."

In paragraph 7 (6) he wrote:

> "I always insisted that all drivers were on contracts and were not employees."

[9] In his affidavit, the Permanent Secretary explained that after Sanyo failed to honour an undertaking to provide records of employment which it was required to keep under the provisions of the Employment Act, he took steps to ascertain the number of voting members of the union working for Sanyo. After enquiries had been made and the taxi base had been visited, he determined that the Union had 63.15% representation.

[10] It is plain that the Appellant's attitude towards the Permanent Secretary was uncooperative and even obstructive. We are satisfied that the Judge (Singh J) was correct in finding as a fact not only that over 50% of Sanyo's drivers were members of the Union but also that Sanyo had refused to accord the Union voluntary recognition. This ground of appeal fails.

[11] After the exchange of the letters between the Union and the Appellant the situation at the Sanyo workplace deteriorated. Apart from the alleged dismissals ("recission of their contracts for breaches", according to the Appellant) there was a strike and a protest meeting at Komo Park. Apparently some drivers seized some taxis. Some were damaged. In January 2003 the Appellant commenced legal proceedings in the High Court (HBC 20/003) against fifteen drivers and the

Union. He sought $17,580 damages and declarations that the contract between Sanyo and the drivers did not create an employer/employee relationship.

[12] The sixth ground of appeal filed on 11 August 2004, was that the High Court had erred in rejecting an application for a stay of the Permanent Secretary's decision pending the outcome of the High Court civil action. This ground of appeal was not pursued.

[13] As acknowledged by Mr. Cameron much the most important issue in these proceedings was whether the Permanent Secretary in "taking into account all the facts and circumstances appearing to be relevant" (Section 8 (1)) before issuing the Compulsory Recognition Order was correct in rejecting the Appellant's contention that however many persons in his workforce the union might claim to have as members, none of them was an employee and therefore the Union was not entitled to recognition at all, either voluntary or compulsory. In other words, the question of recognition simply "did not arise".

[14] In support of his argument that the drivers were independent contractors rather than employees, Mr. Cameron focussed on the terms under which they worked for Sanyo and the proper tests to be applied and the inferences properly to be drawn from them.

[15] While acknowledging the relevance of the common law tests, Mr. Udit submitted that the Permanent Secretary was also justified in taking into account the statutory employment framework including the Wages Regulations (Road Transport) Order LN 46/00; the Public Service (Driver) Regulations LN 60/00 and Public Service (Vehicle Permit) Regulations LN 61/00. Mr. Udit also referred us to the Income Tax Act, The Fiji National Provident Act and the 1997 Constitution. While we were grateful to Mr. Udit for his research, we agree with Mr. Cameron that the central question is to be answered by application of the various common law tests which have been formulated and which were considered in Hollis v Vabu Pty Ltd

(2001) 207 CLR 21 to which we were referred by Mr. Cameron and upon which he largely relied.

[16] The starting point is the written agreement between Sanyo and each of the drivers. We set it out in full. It reads:

"AN AGREEMENT

BETWEEN: Sanyo Cabs (Hereafter now referred as The Company)

AND

WHEREAS

A. The Driver is or about to be engaged by the company upon certain general terms and conditions of Employment on the following terms and conditions:-

B. The Driver is over the age of 18 years and has freely agreed to sign this Agreement.

1. The Driver will be employed on contract basis.
2. The Driver shall pay the sum of $66.00 net to the employer each day and the amount beyond this sum will be the Driver's own income. The income is to be given in to the office before 1.00 p.m. each day.
3. The Driver for all intense (sic) and purposes is an independent contractor and shall be solely responsible for preparation and filing of his/her own tax returns, payments of any Tax due and be responsible for payment of all FNPF as though he/she is self employed person.
4. The operation of the taxi shall be restricted to as far as SUVA, DEUBA, along QUEEN's ROAD and TAILEVU along KING's Road.
5. The employer is responsible for the roadworthiness of the vehicle.
6. In the event of an accident in which the Driver is at fault, utilizing the vehicle for private means that is not in the Company business, the Company will require that the total amount for repair cost to be paid by the Driver.

7. If following an accident, the Driver is convicted of "Driving under the influence" or any other offence the total value of damage and repair cost will be the driver's responsibility.
8. NO repair work to be undertaken by the Driver without the consent of the Company, other than in an emergency and then only sufficient to drive to the nearest garage.
9. The Company's permission is required before the taxi is used outside base metropolitan or Country area.
10. The driving of the taxi is restricted to the Driver only. UNDER NO circumstances are other members of the family permitted to drive the vehicle, nor it is to be lent to anyone else.
11. The Company shall have no control over the Employee's daily driving.
12. SHOULD the Driver wish to leave the Company, he/she is required to give no less than one week notice of termination, except in the casual dismissal.
13. The taxi given to drive is _____ (Registration Number).
14. The Driver shall be indemnify and or compensate the Company against any claim brought against the Company for damaged arising out of negligence of the Driver including claims in any other respect.
15. Every day the driver has to bring in their vehicle for inspection by the management between 8.00 a.m. and 10.00 a.m."

[17] If, as suggested, by Mr. Cameron, this was not a case of an employer/employee agreement then what was it? In Mr. Cameron's submission what the agreement recorded was the terms and conditions under which the drivers hired the taxis from Sanyo. It was, in other words, little more than a rental car agreement between the individual taxi drivers and Sanyo. Once the taxi had been rented by the drivers they used the taxis which they had rented to perform services for their clients, the passengers. No service, it was submitted, was provided by the drivers to Sanyo. All that Sanyo received was the $66 per day, which is what it charged the drivers for hiring its cars.

[18] The classic common law tests which have been applied in order to establish whether there was a contract of service between the parties were summarised by the House of Lords in Short v. J. & W. Henderson Ltd (174 LT 417). The four indicia of a contract of service were held to be:

(a) The master's power of selection of his servants;

(b) The payment of wages or other remuneration;

(c) The master's right to control the method of doing the work; and

(d) The master's right of suspension or dismissal.

[19] Since 1946 the common law has not only moved away from the terminology of master and servant but has also adjusted its approach to ascertaining the nature of the employer/employee relationship to accommodate new methods of working which have evolved in recent years. Whereas the degree of control and superintendence exercised by the putative employer over the putative employee was formerly predominant, the present approach is to consider the "totality of the relationship," in which the degree of control will still be an important consideration (see Stevens v. Broadribb Sawmilling Co Pty Ltd (1986) 160 CLR 16, 29).

[20] As with any other contract, the starting point is the wording of the agreement itself. The first, introductory paragraph to the agreement, paragraph A states that the driver is "about to be engaged by [Sanyo] upon certain general terms and conditions of employment ..." In addition, paragraphs 1, 2, 5 and 11 also refer to employment.

[21] Although paragraph 11 states that Sanyo "shall have no control over the employee's daily driving" it is evident from paragraphs 4, 9, 10 and 15 that this was not in fact the case. Paragraphs 4 and 9 restrict the area of use, paragraph 10 restricts the driving to the named taxi driver and paragraph 15 requires the taxi to be presented for daily inspection. Paragraph 15 in particular would not normally be found in a rental car agreement.

[22] In paragraph 23 of his affidavit filed on about 31 December 2002 the Appellant listed eleven substantial companies and organisations which he described as the "fixed customers of the business [who] would be lost if I did not give them the services". As can be seen from Sanyo's letter of 24 December 2002 Sanyo cabs describes itself as "fully RT controlled". The Appellant listed no fewer than seven clerks and controllers working from the taxi base. In these circumstances it is clear to us that Sanyo is a highly organised and controlled operation of which the drivers were an essential part. While the drivers undoubtedly had the freedom to ply for hire when not otherwise required to assist in the discharge of Sanyo's services to its "fixed customers" we are unable to accept that the drivers freedom to drive where and when and as they wished could reasonably be compared to that enjoyed by the driver of a rented car.

[23] Paragraph 12 of the agreement, referring as it does to the dismissal of drivers also suggests an employer/employee relationship rather than a contract for the rental of a vehicle. On the other hand, paragraph 3 is plainly intended to label the drivers as independent contractors or self employed persons. It should, however, be remembered that "the proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates and not by the label the parties put on it" (TNT Worldwide Express (NZ) Ltd v. Cunningham [1993] 3 NZLR 681, 699).

[24] In our view, the primary function of the drivers was to drive taxis provided and maintained by Sanyo on behalf of Sanyo. By so doing they earned Sanyo the $66 per day which was the income upon which Sanyo depended. That it might have been the case that once the primary duty had been performed, the drivers were relatively free to decide how hard or how long they wished to work for themselves for such sums as they were able to earn beyond the $66 which they were obliged to pay Sanyo, does not in our view alter the basic nature of the relationship.

[25] In our opinion the Permanent Secretary arrived at the right conclusion and the Judge was correct to find that the reality of the total relationship between the drivers and Sanyo was that of employer and employees. For this reason the appeal must fail.

RESULT

The appeal is dismissed with costs which we fix at $1,000.

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Eichelbaum, JA

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Gallen, JA

.....
Scott, JA

Solicitors

Maharaj Chandra & Associates for the Appellant
Messrs. Kohli & Singh for the first Respondent
Attorney-General's Chambers for the second and third Respondents